YAP CHEE KEONG HOLDINGS SDN BHD v. COSMOPOLITAN AVENUE SDN BHD

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[CIVIL APPEAL NO: BA-12AC-14-10-2020]
14 JANUARY 2022

Abstract – *In the absence of any provision under O. 55 r. 7 of the Rules of Court 2012 as to the time period to file an application to adduce fresh evidence for the purpose of hearing an appeal at the High Court against a lower court's decision, the plaintiff's action in filing an application for leave to adduce the bank's consent, which would have a determining influence on the decision of the Sessions Court, did not amount to an abuse of the court process. As the issues raised by the plaintiff in the suit are triable issues requiring lengthy and mature considerations, the action ought not to be struck out. The Sessions Court had committed an error of law by simultaneously dismissing and striking out the action under O. 18 r. 19(1), causing injustice and warranting appellate intervention.*

CIVIL PROCEDURE: *Striking out – Appeal against – Appeal against Sessions Court's order to strike out suit – Suit filed in Sessions Court against defendant for failure to deliver vacant possession – Whether plaintiff had locus standi to file action – Application by plaintiff to adduce bank's consent in hearing of appeal – Admission of fresh evidence – Test of Ladd v. Marshall – Whether applied to O. 55 r. 7(a) and (b) of Rules of Court 2012 – Whether plaintiff required to have bank's consent at time of filing of action – Whether plaintiff raised triable issues – Whether action frivolous, vexatious and abuse of court's process – Whether Sessions Court could simultaneously dismiss and strike out action pursuant to O. 18 r. 19(1) of Rules of Court 2012*

The defendant developed an integrated commercial and residential development project ('project'). By way of two sales and purchase agreements ('two SPAs') entered into by the plaintiff and the defendant, the plaintiff purchased two parcels in the project ('two parcels'). The two SPAs had the same substantive provisions, *inter alia* (i) cl. 24.1 provided that the defendant shall deliver vacant possession of the two parcels in the manner stipulated in cl. 25 within 42 calendar months from the date the building plan approval was obtained; (ii) if the defendant failed to deliver vacant possession of the two parcels in the manner stipulated, the defendant shall be liable to pay liquidated damages ('LD') to the plaintiff; (iii) that the defendant shall let the plaintiff into possession of the two parcels upon the issuance of a certificate by the defendant's architect; and (iv) the plaintiff shall not occupy the two parcels until the issuance of the certificate of completion and compliance

A ('CCC'). The plaintiff obtained loans from United Overseas Bank (M) Bhd ('bank') to finance the purchase of the two parcels (bank loans) and for this purpose, the plaintiff entered into two loan agreements *cum* assignments with the bank ('the two LACAs'). Subsequently, the architect issued a certificate of stage completion ('CSC') regarding the two parcels. The defendant
B informed the plaintiff that the construction of the two parcels had been completed but the plaintiff could not occupy the two parcels until the CCC was issued. The plaintiff replied that the delivery of vacant possession of the two parcels had been delayed beyond 42 months and requested for details of the building plan approval for the purpose of calculating the amount of LD
C payable by the defendant to the plaintiff. The defendant provided computation of the LD sums due to the plaintiff for the two parcels and that the defendant would set off certain sums from the two LD sums due from the plaintiff to the defendant and the balance of the two LD sums will be paid in 12 monthly instalments. The plaintiff accepted the offer and agreed that
D the above-mentioned payment shall be the full and final settlement of any sums and claims the plaintiff may have against the defendant in respect of the late delivery of vacant possession. However, the defendant's instalment payments had not been made. Together with the defendant, the plaintiff had inspected the two parcels on four occasions and it was the plaintiff's submission that the two parcels were not 'ready' for delivery of vacant
E possession due to various defects. The plaintiff thus reserved the right to claim further LD from the defendant. After the issuance of the CCC, the plaintiff attempted four times to occupy the two parcels but to no avail as the rectification works of the defects in the two parcels and common areas were still ongoing. The defendant then issued invoices to the plaintiff for
F various charges regarding the two parcels ('maintenance charges') but the plaintiff refused to pay the said charges on the ground that the plaintiff had yet to occupy the two parcels. The plaintiff filed this suit in the Sessions Court against the defendant ('this action') and pleaded, among others, that the defendant had breached the two SPAs by its failure to deliver vacant
G possession of the two parcels as stipulated and by denying the plaintiff the right to occupy the two parcels upon the issuance of the CCC. The plaintiff claimed that it had suffered loss and damages. The defendant argued, *inter alia*, that in view of the LACAs, the plaintiff had no *locus standi* to file this action without the consent of the bank and that the plaintiff had accepted the
H two settlement agreements regarding the LD ('alleged settlement agreements'). The defendant filed an application in court (encl. 7) for the plaintiff's writ and statement of claim to be struck off and for this action to be dismissed and/or struck out on the ground that this action did not disclose any reasonable cause of action as understood in O. 18 r. 19(1)(a) of the Rules of Court 2012 ('RC'). The Sessions Court allowed encl. 7. The plaintiff thus
I appealed to this court against the SC's order ('this appeal'). After the filing of this appeal, the bank gave consent to the institution of this action by the

plaintiff ('bank's consent'). The plaintiff filed an application in court (encl. 9) for leave of the High Court for the plaintiff to adduce the bank's consent ('this action) in the hearing of this appeal. The issues that arose were (i) with regard to encl. 9: (a) whether the test laid down in the case of *Ladd v. Marshall* applied to O. 55 r. 7(a) and (b) of the RC; and (b) should the court allow the plaintiff to admit the bank's consent ('this action') for the hearing of this appeal pursuant to O. 55 r. 7(a) and (b) of the RC; (ii) in respect of this appeal (a) whether the plaintiff had *locus standi* to file this action without the bank's consent. This issue concerned whether LACA's were (i) absolute assignments of all of the plaintiff's equitable and beneficial title, rights, interest and benefit in the two parcels to the bank (absolute assignments) within the meaning of s. 4(3) of the Civil Law Act 1956 ('CLA'); or (ii) assignments of the two parcels by way of charge in favour of the bank so as to secure the plaintiff's repayment of the bank loans (assignments by way of charge); (b) was the plaintiff required by CLA, RC or case law to have the bank's consent (this action) at the time of the filing of this action; (c) regarding the alleged settlement agreements (i) whether the plaintiff had pleaded that there was no consideration for the alleged settlement agreements [lack of consideration (alleged settlement agreements)] within the meaning of O. 18 rr. 7(1) and 8(1)(a) to (c) of the RC; and (ii) did the plaintiff raise any triable issue that the defendant could not rely on the alleged settlement agreements due to lack of consideration, alleged defendant's misrepresentation and/or the defendant's failure to make the defendant's instalment payments; (d) could the plaintiff file this action for prayer (declarations) under s. 41 of the Specific Relief Act 1950 ('SRA') and O. 15 r. 16 RC without *locus standi* and cause of action; and (e) whether SC could simultaneously dismiss and strike out this action pursuant to O. 18 r. 19(1) of the RC.

Held (allowing appeal):

(1) According to the *Ladd v. Marshall* test, the following three conditions have to be satisfied cumulatively before an appellate court may exercise its discretion to admit fresh evidence for the hearing of the appeal (i) fresh evidence could not have been obtained with reasonable diligence for use at the court of first instance; (ii) the fresh evidence would probably have an important influence on the result of the appeal, although it need not be decisive; and (iii) the fresh evidence should be credible but need not be incontrovertible. Order 55 r. 7 of the RC applies to all appeals from subordinate courts to the High Court. Fresh evidence could be admitted for the hearing of the appeal if two conditions were fulfilled and the burden lay solely with the applicant. The first condition has two alternative limbs (i) the fresh evidence was not available to the applicant at the hearing in the lower court and this applied to subsequent evidence; and (ii) the fresh evidence existed at the hearing in the subordinate court but was not available to the applicant

despite the exercise of reasonable diligence by the applicant, which concerned existent evidence. There were two alternative limbs of the second condition (O. 55 r. 7 of the RC) *ie*, the fresh evidence if true would have had a determining influence upon the decision of the lower court and would have been likely to have a determining influence upon the subordinate court's decision. The second condition of O. 55 r. 7 of the RC is different from the second condition and the third condition of the *Ladd v. Marshall* test. Accordingly, the *Ladd v. Marshall* test should not apply in the application of O. 55 r. 7. If otherwise, the second condition (O. 55 r. 7) would be rendered redundant. An application of the less strict test (*Ladd v. Marshall*) may amount to a circumvention of the mandatory two conditions of O. 55 r. 7 of the RC. (paras 31 & 34)

(2) The plaintiff had discharged the onus to prove cumulatively that the two conditions (O. 55 r. 7 RC) (i) the first alternative limb (first condition of O. 55 r. 7 RC) was fulfilled because the bank's consent (this action) had only been furnished after the SC's order. It was clear that the bank's consent (this action) constituted subsequent evidence for the purpose of the first alternative limb (first condition of O. 55 r. 7 RC); and (ii) one of the grounds in support of encl. 7 was the fact that this action had been filed without the bank's consent. The defendant did not dispute the bank's consent (this action). Consequently, the bank's consent (this action) – (a) would have had a determining influence upon SC's decision in encl. 7 within the meaning of the first alternative limb (second condition of O. 55 r. 7 RC); or (b) would have been likely to have a determining influence on SC's order as understood in the second alternative limb. Order 55 r. 7 of the RC does not stipulate any time period for the filing of an application to adduce fresh evidence for the purpose of hearing an appeal to the High Court against a lower court's decision. Hence, encl. 9 could not amount to an abuse of court process. (paras 35, 37 & 38)

(3) The court may refer to the recital to an agreement in the interpretation of the agreement. Paragraph 5, recital ('LACAs') clearly stated that the plaintiff's repayment of the bank loans is 'secured' by the LACAs. Clause 8 (LACAs) provided that as consideration for the bank loans, the plaintiff 'absolutely assigns' to the bank the 'full and entire' of the plaintiff's 'benefits, rights, title and interest' in the two SPAs to the bank. When cl. 8 (LACAs) is read together with the provisions in the LACAs, cl. 8 (LACAs) could not displace the manifest intention between the bank and the plaintiff that the two LACAs were assignments by way of charge (not absolute assignments). A construction of all the provisions in the LACAs within their 'four corners' supported this decision. The plaintiff was not required to have the bank's consent to this action as the plaintiff was still the equitable and beneficial owner of the two parcels. (paras 45-47)

(4) Order 15 r. 6(1) of the RC provides that a 'cause or matter shall not be defeated by reason of the ... non-joinder of any party.' If this action 'shall not be defeated' solely by reason of the non-joinder of the bank to this action, this action should not also be struck out merely because the plaintiff did not have the bank's consent when this action was filed. According to O. 1A and O. 2 r. 1(2) of the RC, the provisions in O. 15 r. 6(1)(2)(b)(i), (ii) and (4) of the RC should be applied by the court with regard to the 'overriding interest of justice and not only to the technical non-compliance' of the RC. (para 49)

(5) This court could not accept the defendant's submission that the plaintiff's reply had not pleaded lack of consideration (alleged settlement agreements) on the following reasons (i) the plaintiff had pleaded sufficient 'material facts' regarding lack of consideration (alleged settlement agreements) as required by O. 18 r. 7(1) of the RC; (ii) plaintiff had made a specific pleading within the meaning of O. 18 r. 8(1)(a) of the RC which made the defendant's defence of alleged settlement agreements 'not maintainable'; (iii) the defendant could not claim to be taken by surprise as understood in O. 18 r. 8(1)(b) of the RC by the plaintiff's reliance on lack of consideration (alleged settlement agreements); (iv) the plaintiff had complied with O. 18 r. 8(1)(c) of the RC by raising an issue of fact with respect to lack of consideration (alleged settlement agreements) which had not been pleaded in the SOC; and (v) as mandated by O. 1A and O. 2 r. 1(2) of the RC, the court shall apply O. 18 rr. 7(1) and 8(1) of the RC with regard to the overriding interest of justice. (para 55)

(6) The plaintiff had raised issues such as (i) were the alleged settlement agreements void due to lack of consideration (ii) whether there was alleged defendant's misrepresentation which would render the alleged settlement agreements voidable at the plaintiff's option; and (iii) whether the defendant breached the alleged settlement agreements by not making defendant's instalment payments. With these triable issues, it was not a plain and obvious case for SC to strike out this action. This action was neither frivolous nor vexatious and did not constitute an abuse of court process. The prayer (declarations) raised questions of law, issues of fact and questions of mixed law and fact which required lengthy and mature consideration. As such, this action should not have been struck out by SC. (paras 57, 59 & 65)

(7) The court had the following five discretionary powers pursuant to O. 18 r. 19(1) of the RC: (i) the court may strike out a pleading, endorsement on a pleading, an action or counterclaim; (ii) the court may allow a party to amend a pleading, endorsement on a pleading, action or counterclaim; (iii) the court may stay an action or counterclaim; (iv) the court may dismiss an action or counterclaim; or (v) the court may enter a judgment in an action or counterclaim. The court could not

simultaneously dismiss and strike out an action or counterclaim under O. 18 r. 19(1) of the RC. Hence, the SCJ had committed an error of law by simultaneously dismissing and striking out this action. The error of law had caused an injustice to the plaintiff which warranted appellate intervention. (para 68)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors [2015] 1 LNS 755 HC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Lam Soon Cannery Co v. Hooper & Co [1965] 1 LNS 78 ***(refd)***

Lau Foo Sun v. Government Of Malaysia [1970] 1 LNS 56 FC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals [2004] 4 CLJ 282 CA ***(refd)***

Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***

Muniandy Subrayan & Ors. v. Chairman And Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn. Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(refd)***

Osman Ismail & Ors v. Kamaralzaman Idris & Ors [2020] 1 LNS 1296 HC ***(refd)***

Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***

Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Tan Kang Hai v. Slimming Sanctuary Sdn Bhd [2016] 1 LNS 595 HC ***(refd)***

Tan Sri Musa Hj Aman v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor And Another Appeal [2020] 3 CLJ 42 CA ***(refd)***

Teoh Kien Peng & Anor v. Thannimalai Subramaniam [2009] 1 LNS 308 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)

Rules of Court 2012, O. 1 r. 4(1), O. 1A, O. 2 r. 1(2), O. 15 rr. 6(1), (2)(b)(i), (ii), (4), 16, O. 18 rr. 7(1), 8(1)(a), (b), (c), 19(1)(a), (b), (d), O. 55 r. 7(a), (b), O. 56 r. 1(3A), O. 59 r. 21, O. 92 r. 4

Rules of the Court of Appeal 1994, r. 7(3A)

Specific Relief Act 1950, s. 41

For the appellant - Tatvaruban Subramaniam & Noherr Thadani; M/s Skrine

For the respondent - Sam How Pek Lean & Winnie Kau Hui Ni; M/s Lim Soh & Goonting

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Kian Kheong J:

Background

[1] I shall refer to parties in this judgment as they were in the Sessions Court (SC).

[2] The defendant company (defendant) developed an integrated commercial and residential development project known as "Empire City @ Damansara" (project).

[3] On 23 February 2011, by way of two sale and purchase agreements (two SPA's) entered into by the plaintiff company (plaintiff) and defendant, the plaintiff purchased two parcels in the project, namely parcels M-26-07 and M26-08 (two parcels).

[4] The two SPA's have the same substantive provisions. I reproduce below the relevant terms of the two SPA's:

(i) clause 24.1 has provided that the defendant shall deliver vacant possession of the two parcels in the manner stipulated in cl. 25 within 42 calendar months (42 months period) from the date the "building plan approval" is obtained or the date of the SPA's, whichever is later [cl. 24.1 (SPA's)]. According to cl. 3.1 SPA's, building plan approval means approval of the "building plan" [as understood in cl. 1.1(d) SPA's] by the "appropriate authority" [defined in cl. 1.1(b) SPA's];

(ii) clause 24.2 has stated that, among others, if the defendant fails to deliver vacant possession of the two parcels in the manner stipulated in cl. 25 within the time stated in cl. 24.1 (SPA's), the defendant shall be liable to pay liquidated damages (LD) to the plaintiff from day to day at the rate of 10% per annum on the portion of the "purchase price" [defined in cl. 4.1 read with Part III of the Sixth Schedule to the SPA's] from the expiry date of delivery of vacant possession of the two parcels in cl. 24.1 (SPA's) until the date of notice from the defendant to the plaintiff requesting the plaintiff to take vacant possession of the two parcels [cl. 24.2 (SPA's)];

(iii) according to cl. 25.1, the defendant shall let the plaintiff into possession of the two parcels upon the issuance of a certificate by the defendant's architect (architect) certifying that the construction of the two parcels has been practically completed in accordance with the SPA's and provided that the plaintiff has paid all monies due to the defendant and the plaintiff has performed all the terms and covenants on the plaintiff's part under the SPA's [cl. 25.1 (SPA's)];

(iv) by reason of cl. 25.2, the plaintiff "shall not occupy" the two parcels until the issuance of the "certificate of completion and compliance" (CCC) in respect of the two parcels [cl. 25.2 (SPA's)];

(v) clause 26 has provided that the defendant, shall at its own cost, duly comply with all the requirements of the appropriate authority which are necessary for the issuance of CCC [cl. 26 (SPA's)]; and

(vi) by reason of cl. 30, time "shall be the essence" of the two SPA's.

[5] The plaintiff had obtained loans from United Overseas Bank (M) Bhd (Bank) to finance the purchase of the two parcels (bank loans). For this purpose, the plaintiff had entered into two "loan agreements cum assignments" with the bank (two LACA's). The defendant had consented in writing to the two LACA's. The substantive provisions of the two LACA's are the same. The following provisions in the two LACA's are pertinent:

(i) paragraph 5 of the recital has stated that, among others, the bank loans are "secured" by two assignments of the plaintiff's "benefits, rights, title and interest" in the two SPA's to the bank [para. 5, recital (LACA's)];

(ii) clause 1 provides, among others, that the plaintiff "covenants and undertakes" to pay "ON DEMAND" by the bank all sums due to the bank from the plaintiff in respect of the bank loans [cl. 1 (LACA's)];

(iii) according to cl. 8, among others, as consideration for the bank loans, the plaintiff "absolutely assigns" to the bank the "full and entire" of the plaintiff's "benefits, rights, title and interest" in the two SPA's to the bank [cl. 8 (LACA's)];

(iv) clause 9 has provided that, among others, the "security" created by the two LACA's are "expressly intended to be and shall be a continuing security for all monies whatsoever now or hereafter from time to time" owing to the bank by the plaintiff [cl. 9 (LACA's)];

(v) by virtue of cl. 11, the bank may require the plaintiff to provide further security for the bank loans [cl. 11 (LACA's)];

(vi) clause 12.11 [cl. 12.11 (LACA's)] states that the plaintiff "covenants" with the bank that the plaintiff "will during the continuance" of the LACA's pay, among others, all service charges and maintenance fees payable regarding the two parcels to the defendant or the management corporation constituted under the Strata Titles Act 1985 (STA);

(vii) the plaintiff is required by cl. 17.1 [cl. 17.1 (LACA's)] to:

(a) insure the two parcels with the bank's interest as a "chargee" of the two parcels and "loss payee" endorsed on the insurance policies of the two parcels [insurance policies (parcels)]; and

(b) deposit the insurance policies (parcels) with the bank as chargee of the two parcels;

(viii) according to cl. 25, upon the issuance of the strata titles for the two parcels, the plaintiff "shall" execute and deliver charges of the two parcels to the bank to secure the plaintiff's full payment of the bank loans [cl. 25 (LACA's)]; and

(ix) clause 27 has stated that, among others, upon full payment of the bank loans, the plaintiff "shall be entitled … to obtain a discharge and release" of the two parcels [cl. 27 (LACA's)].

[6] On 11 August 2016, the architect issued a "certificate of stage completion" regarding, among others, the two parcels (CSC).

[7] By way of the defendant's two letters dated 14 November 2016 to the plaintiff [defendant's two letters (14 November 2016)], the defendant informed the plaintiff as follows, among others:

(i) the construction of the two parcels had been completed;

(ii) the defendant gave notice to the plaintiff to take delivery of the vacant possession of the two parcels within 14 days from the date of the defendant's two letters (14 November 2016);

(iii) the issuance of CCC by Majlis Bandaraya Petaling Jaya (MBPJ) was still pending; and

(iv) the plaintiff could not occupy the two parcels until CCC was issued.

[8] The plaintiff replied to the defendant's two letters (14 November 2016) by way of two letters dated 22 November 2016 [plaintiff's two letters (22 November 2016)]. According to plaintiff's two letters (22 November 2016), among others:

(i) delivery of vacant possession of the two parcels had been delayed beyond 42 months period as provided in cl. 24.1 (SPA's); and

(ii) the plaintiff requested for details of the building plan approval for the purpose of calculating the amount of LD payable by the defendant to the plaintiff.

[9] In response to plaintiff's two letters (22 November 2016), the defendant sent two letters dated 9 December 2016 [defendant's two letters (9 December 2016)]. The defendant's two letters (9 December 2016) stated as follows, among others:

(i) the defendant provided computation of LD sums due to the plaintiff for the two parcels [two LD sums (defendant's computation)];

(ii) the defendant "will set off" certain sums from the two LD sums (defendant's computation) which were due from the plaintiff to the defendant and the balance of the two LD sums (defendant's computation) "will be paid" in 12 monthly instalments after the plaintiff's acceptance of the offer in the defendant's two letters (9 December 2016) (defendant's instalment payments); and

(iii) the two LD sums (defendant's computation) "shall be the full and final settlement of any sums and claims" that the plaintiff may have against the defendant in respect of the late delivery of vacant possession of the two parcels.

[10] On 22 December 2016, the plaintiff accepted the offer in the defendant's two letters (9 December 2016) as follows [as stated in the defendant's two letters (9 December 2016)]:

> *[The plaintiff] hereby acknowledge receipt and agreed that the above-mentioned payment of [LD] shall be the full and final settlement of any sums and claims that [the plaintiff] may have against [the defendant] in respect of the late delivery of vacant possession of [two parcels].*
>
> (emphasis added)

[11] The defendant's instalment payments had not been made despite the plaintiff's two letters dated 22 June 2017 to the defendant (which requested the defendant's instalment payments to be made "without further delay").

[12] Together with the defendant, the plaintiff had inspected the two parcels on four occasions on 31 January 2017, 14 June 2017, 20 April 2018 and 6 March 2019. The plaintiff had sent letters dated 7 February 2017 and 22 June 2017 to the defendant which stated that, among others:

(i) the two parcels were not "ready" for delivery of vacant possession due to various defects; and

(ii) the plaintiff reserved the right to claim further LD from the defendant.

[13] By way of the defendant's two letters dated 26 March 2019 to the plaintiff, the defendant sent a copy of CCC dated 13 March 2019 to the plaintiff.

[14] After the issuance of the CCC, the plaintiff attempted four times to occupy the two parcels on 10 April 2019, 29 April 2019, 10 May 2019 and 18 June 2019 (plaintiff's four occupation attempts). The plaintiff's four occupation attempts were to no avail due to the following reasons:

(i) the plaintiff had been informed by the defendant's employee that the plaintiff was not allowed to enter the two parcels; and

(ii) the rectification works of the defects in the two parcels and "common areas" were still ongoing.

[15] There was an exchange of letters between the plaintiff's solicitors and defendant regarding the following matters, among others:

(i) the plaintiff alleged that there were still defects in the two parcels; and

(ii) the defendant had yet to pay LD to the plaintiff.

[16] The defendant had issued invoices dated 30 June 2019 to 3 September 2019 to the plaintiff for various charges regarding the two parcels (maintenance charges) but the plaintiff refused to pay the maintenance charges on the ground that the plaintiff had yet to occupy the two parcels.

[17] The plaintiff only occupied the two parcels on 23 March 2021.

Legal proceedings

[18] The plaintiff filed this suit in SC against the defendant (this action). The statement of claim (SOC) in this action pleaded as follows, among others:

(i) the two SPA's have an implied term [alleged implied term (SPA's)] that the defendant would obtain CCC within a reasonable time from the date of issuance of the "certificate of practical completion" (CPC);

(ii) CSC was not a CPC;

(iii) the defendant was liable to pay LD to the plaintiff for the late delivery of vacant possession of the two parcels;

(iv) despite the issuance of the CCC, the plaintiff could not occupy the two parcels due to, among others, defects in the two parcels. Hence, the plaintiff's refusal to pay the maintenance charges to the defendant;

(v) the defendant had breached the two SPA's [alleged defendant's breaches (SPA's)] as follows, among others:

(a) failure to deliver vacant possession of the two parcels as stipulated in the two SPA's;

(b) failure to ensure that the two parcels were practically complete when CSC was issued;

(c) failure to ensure that CSC met the requirements of a CPC;

(d) the alleged implied term (SPA's) was breached when CCC was not obtained by the defendant within a reasonable period of three months from the issuance of the CPC;

(e) the defendant had breached cl. 25.2 (SPA's) by denying the plaintiff's right to occupy the two parcels upon the issuance of the CCC; and

(f) the defendant had knowingly and/or recklessly imposed the maintenance charges on the plaintiff when the defendant had denied the plaintiff's right to occupy the two parcels upon the issuance of the CCC;

(vi) the plaintiff had suffered loss and damage due to the alleged defendant's breaches (SPA's); and

(vii) the plaintiff prays for the following reliefs against the defendant, among others:

(a) declarations [prayer (declarations)] that:

(1) a natural interpretation of cl. 24 (SPA's) and cl. 25 (SPA's) amounts to an absurdity and these two clauses should be construed to mean that the 42 months period commenced from the issuance of CCC and not CPC;

(2) CSC does not amount to a CPC; and

(3) the plaintiff is not obliged to pay the maintenance charges to the defendant and/or the maintenance charges are null and void;

(b) the defendant shall pay LD and loss of rental income to the plaintiff as prayed for in sub-paras. 50(c) to (g) SOC; and

(c) the defendant shall be liable in general damages to the plaintiff for alleged defendant's breaches (SPA's) which will be assessed by the court.

[19] The defence has pleaded as follows, among others:

(i) in view of the LACA's, the plaintiff had no *locus standi* to file this action without the consent of the bank; and

(ii) by virtue of the plaintiff's acceptance of the defendant's two letters (9 December 2016), there were two settlement agreements regarding the LD (alleged settlement agreements).

[20] It is pleaded in the plaintiff's reply to defence (plaintiff's reply), among others, as follows:

(i) the plaintiff had *locus standi* to file this action without the consent of the bank because the LACA's were purely to secure the plaintiff's repayment of the bank loans; and

(ii) with regard to the alleged settlement agreements:

(a) the plaintiff had entered into the alleged settlement agreements based on the defendant's misrepresentation that the two parcels were practically complete (alleged defendant's misrepresentation). Consequently, the alleged settlement agreements were void or voidable at the plaintiff's option;

(b) the defendant's instalment payments had not been made; and

(c) the defendant's breach of the alleged settlement agreements amounts to a repudiation of the alleged settlement agreements and the plaintiff accepts such a repudiation.

[21] The defendant filed an application in court encl. no. 7 (encl. 7) for the following orders, among others:

(i) the writ and SOC be struck out; and

(ii) this action be dismissed and/or struck out;

on the ground that:

(a) this action does not disclose any reasonable cause of action as understood in O. 18 r. 19(1)(a) of the Rules of Court 2012 (RC);

(b) this action is scandalous, frivolous or vexatious under O. 18 r. 19(1)(b) RC [para. (b)]; and

(c) this action constitutes an abuse of court process pursuant to O. 18 r. 19(1)(d) RC [para. (d)], O. 92 r. 4 RC, the court's inherent jurisdiction or power.

[22] The learned Sessions Court Judge, Puan Azian binti Othman (SCJ), allowed encl. 7 with the following order, among others (SC's order):

(i) the writ and SOC be struck out; and

(ii) this action be dismissed and/or struck out.

[23] The plaintiff has appealed to this court against SC's order (this appeal).

[24] After the filing of this appeal, in a letter dated 27 November 2020, the bank gave consent to the institution of this action by the plaintiff [bank's consent (this action)].

[25] The plaintiff has filed an application in court encl. 9 (encl. 9) for leave of the High Court for the plaintiff to adduce the bank's consent (this action) in the hearing of this appeal.

Issues

[26] The following questions shall be determined in this appeal:

(i) with regard to encl. 9:

(a) whether the test laid down by Denning LJ (as he then was) in United Kingdom's (UK) Court of Appeal case of *Ladd v. Marshall* [1954] 3 All ER 745 [Test (*Ladd v. Marshall*)] applies to O. 55 r. 7(a) and (b) RC; and

(b) should the court allow the plaintiff to admit the bank's consent (this action) for the hearing of this appeal pursuant to O. 55 r. 7(a) and (b) RC?; and

(ii) in respect of this appeal:

(a) did the plaintiff have *locus standi* to file this action without the bank's consent? This issue concerns whether LACA's are:

(1) absolute assignments of all of the plaintiff's equitable and beneficial title, rights, interest and benefit in the two parcels to the bank (absolute assignments) within the meaning of s. 4(3) of the Civil Law Act 1956 (CLA); or

(2) assignments of the two parcels by way of charge in favour of the bank so as to secure the plaintiff's repayment of the bank loans (assignments by way of charge);

(b) is the plaintiff required by CLA, RC or case law to have the bank's consent (this action) at the time of the filing of this action?;

(c) regarding the alleged settlement agreements:

(1) whether the plaintiff's reply had pleaded that there was no consideration for the alleged settlement agreements [lack of consideration (alleged settlement agreements)] within the meaning of O. 18 rr. 7(1) and 8(1)(a) to (c) RC; and

(2) has the plaintiff raised any triable issue that the defendant cannot rely on the alleged settlement agreements due to lack of consideration (alleged settlement agreements), alleged defendant's misrepresentation and/or the defendant's failure to make the defendant's instalment payments?;

(d) could the plaintiff file this action for prayer (declarations) under s. 41 of the Specific Relief Act 1950 (SRA) and O. 15 r. 16 RC without *locus standi* and cause of action?; and

(e) whether SC could simultaneously dismiss and strike out this action pursuant to O. 18 r. 19(1) RC. This is a novel question.

Enclosure 9

Whether O. 55 r. 7 RC Provides For Test (Ladd v. Marshall)

[27] Order 55 r. 7 RC states as follows:

Restriction on fresh evidence

O. 55 r. 7. *At the hearing of any appeal, fresh evidence shall not be admitted unless the Judge is satisfied that:*

(a) *at the hearing in the Subordinate Court, the new evidence was not available to the party seeking to use it or that reasonable diligence would not have made it so available; and*

(b) *the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the Subordinate Court.*

(emphasis added)

[28] Order 55 r. 7 RC is similar to:

(i) Rule 7(3A) of the Rules of the Court of Appeal 1994 (RCA) [appeals to the Court of Appeal against decisions of High Court Judges or Judicial Commissioners (HCJ/JC)]; and

(ii) Order 56 r. 1(3A) RC (appeals from decisions of Registrars of the High Court to HCJ/JC).

[29] In opposing encl. 9, the defendant's learned counsel has relied on the test (*Ladd v. Marshall*) as laid down by Denning LJ in *Ladd v. Marshall*, at p. 748, as follows:

> *It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.*
>
> (emphasis added)

[30] Our courts have applied the test (*Ladd v. Marshall*) in, among others, the following cases:

(i) Thomson LP's oral judgment in the Federal Court (sitting in Singapore) in *Lam Soon Cannery Co v. Hooper & Co* [1965] 1 LNS 78; [1965] 2 MLJ 148, at p. 148;

(ii) Suffian FJ's (as he then was) decision in the Federal Court case of *Lau Foo Sun v. Government Of Malaysia* [1970] 1 LNS 56; [1970] 2 MLJ 70, at p. 71; and

(iii) the following judgments by Abdul Kadir Sulaiman JCA (as he then was) in the Court of Appeal:

  (a) *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals* [2004] 4 CLJ 282, at pp. 289 to 290; and

  (b) *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238, at p. 243.

[31] According to the test (*Ladd v. Marshall*), the following three conditions [three conditions (*Ladd v. Marshall*)] have to be satisfied cumulatively before an appellate court may exercise its discretion to admit fresh evidence for the hearing of the appeal:

(i) the fresh evidence could not have been obtained with reasonable diligence for use at the court of first instance [first condition (*Ladd v. Marshall*)];

(ii) the fresh evidence would probably have an important influence on the result of the appeal, although it need not be decisive [second condition (*Ladd v. Marshall*)]; and

(iii) the fresh evidence should be credible but need not be incontrovertible [third condition (*Ladd v. Marshall*)].

[32] The plaintiff's learned counsel has attempted to persuade me that the test (*Ladd v. Marshall*) should apply with less rigour in interlocutory applications [less strict test (*Ladd v. Marshall*)], such as this appeal (against SC's order). In support of the less strict test (*Ladd v. Marshall*), the following cases have been cited:

(i) in *Teoh Kien Peng & Anor v. Thannimalai Subramaniam* [2009] 1 LNS 308; [2008] MLJU 403, Abdul Malik Ishak JCA delivered the following dissenting judgment:

> *Should we slavishly follow Ladd v. Marshall or should we be freed from its strait-jacket three conditions? Sad to say, it is the courts that let the three conditions in Ladd v. Marshall to be compartmentalised as a strait-jacket. For my part, I will not let Ladd v. Marshall to stand in the way of doing justice to an individual case. Old vintage cases like Scott v. Scott* [1863] 3 Sw. & Tr. 320, 325, The English Reports volume 164, page 1298, at 1300; *and Brown v. Dean And Another [1910] AC 373 should be referred to and these two cases have been overshadowed and ignored and put into oblivion since the arrival of Ladd v. Marshall in 1954. ...*
>
> ...
>
> *Cases may arise in future where it would be proper to admit fresh evidence on an appeal by way of a re-hearing on the simple ground that it appears just to do so and nothing else (Sinanide v. La Maison Cosmeo* [1927-1928] vol: XLIV The Times Law Reports 574). *An objection may be raised to the receipt of fresh evidence where that would trigger a re-trial like the case of Ladd v. Marshall as opposed to an objection of receiving fresh evidence on an appeal by way of a re-hearing. The distinction between these two was set out in the case of Ellis v. Leeder* [1950-1951] Vol. 82 C.L.R. 645 *and there at page 655 it was held that a Court of Appeal invited to receive further evidence was to enable it to be placed in a better position to determine an appeal which was before it whereas a court concerned with the setting aside of the decision obtained after a regular trial would send the case down for a new trial.*
>
> ...
>
> *Of course, you cannot allow Ladd v. Marshall to stand in the way of doing justice in an individual case. I have said this earlier. When you see this happening, you will notice that the decided cases have been distinguished by the judges and when this happens you will see that the law has become more elaborate.*
>
> ...

For my part, I have this to say. That I should not "affront common sense" by shutting my eyes and not allow the reception of those photographs as fresh evidence.

Ladd v. Marshall is a "thorn in the flesh" for many applicants who are interested in adducing new or fresh evidence. Just like the English Civil Procedure Rules 1998 ("CPR"), our rule 7(3A) [RCA] should relax the rigours of Ladd v. Marshall.

At the end of the day, the criticism that can be advanced in this appeal would be this. That the sessions court judge was given an incomplete disclosure in regard to the recovery of the respondent/plaintiff. This Court certainly has the jurisdiction to avoid real injustice in exceptional and appropriate cases. This is one of those cases.

(emphasis added); and

(ii) the above judgment of Abdul Malik Ishak JCA in *Teoh Kien Peng* was referred to by Kamardin Hashim JCA in the Court of Appeal in *Tan Sri Musa Hj Aman v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor And Another Appeal* [2020] 3 CLJ 42; [2020] 3 MLJ 46, at [49] to [51].

[33] In support of encl. 9, reliance has also been placed by the plaintiff's learned counsel on cases decided in UK and Singapore.

[34] I am of the following view regarding O. 55 r. 7 RC:

(i) the phrase "fresh evidence" is not defined in O. 55 r. 7 RC. Nor does O. 1 r. 4(1) RC (the definition provision in RC) provide a meaning of "fresh evidence". The expression "fresh evidence" means:

(a) evidence which exists at the time of the hearing in the subordinate court (existent evidence). The party (applicant) who has applied for leave of the High Court to admit existent evidence at the hearing of the appeal, may or may not be aware of the existent evidence at the hearing in the lower court; and

(b) evidence which only came into being after the hearing in the subordinate court (subsequent evidence);

(ii) Order 55 r. 7 RC applies to all appeals from subordinate courts to the High Court. This is clear from the employment of the words "any appeal";

(iii) fresh evidence can be admitted for the hearing of the appeal if two conditions [two conditions (O. 55 r. 7 RC)] are fulfilled cumulatively. The two conditions (O. 55 r. 7 RC) are mandatory because the Rules Committee has used the words "fresh evidence shall not be admitted unless the judge is satisfied". The burden to satisfy the two conditions (O. 55 r. 7 RC) lies solely with the applicant;

(iv) the first condition of the two conditions (O. 55 r. 7 RC) is provided in O. 55 r. 7(a) RC [first condition (O. 55 r. 7 RC)]. The first condition (O. 55 r. 7 RC) has two alternative limbs, namely:

(a) the fresh evidence was not available to the applicant at the hearing in the lower court [first alternative limb (first condition of O. 55 r. 7 RC)]. The first alternative limb (first condition of O. 55 r. 7 RC) applies to subsequent evidence; or

(b) the fresh evidence existed at the hearing in the subordinate court but was not available to the applicant despite the exercise of reasonable diligence by the applicant [second alternative limb (first condition of O. 55 r. 7 RC)]. The second alternative limb (first condition of O. 55 r. 7 RC) concerns existent evidence;

(v) the second condition of the two conditions (O. 55 r. 7 RC) is stipulated in O. 55 r. 7(b) RC [second condition (O. 55 r. 7 RC)]. There are two alternative limbs of the second condition (O. 55 r. 7 RC), ie, the fresh evidence, if true:

(a) would have had a determining influence upon the decision of the lower court [first alternative limb (second condition of O. 55 r. 7 RC)]; or

(b) would have been likely to have a determining influence upon the subordinate court's decision [second alternative limb (second condition of O. 55 r. 7 RC)];

(vi) the second condition (O. 55 r. 7 RC) is different from the second condition (*Ladd v. Marshall*) and third condition (*Ladd v. Marshall*). Accordingly, the test (*Ladd v. Marshall*) should not apply in the application of our O. 55 r. 7 RC. If otherwise, the second condition (O. 55 r. 7 RC) will be rendered redundant;

(vii) an application of the less strict test (*Ladd v. Marshall*) may amount to a circumvention of the mandatory two conditions (O. 55 r. 7 RC): please refer to the above sub-para. (iii); and

(viii) in view of our own mandatory O. 55 r. 7 RC, there is no need to resort to cases decided in UK and Singapore.

Can Plaintiff Adduce Bank's Consent (This Action) For Hearing Of This Appeal?

[35] I am of the view that the plaintiff has discharged the onus to prove cumulatively the two conditions (O. 55 r. 7 RC). My reasons are as follows:

(i) the first alternative limb (first condition of O. 55 r. 7 RC) is fulfilled because the bank's consent (this action) has only been furnished after SC's order. It is clear that the bank's consent (this action) constitutes subsequent evidence for the purpose of the first alternative limb (first condition of O. 55 r. 7 RC); and

(ii) one of the grounds in support of encl. 7 was the fact that this action had been filed without the bank's consent. The defendant does not dispute the bank's consent (this action). Consequently, the bank's consent (this action):

(a) would have had a determining influence upon SC's decision in encl. 7 within the meaning of the first alternative limb (second condition of O. 55 r. 7 RC); or

(b) would have been likely to have a determining influence on SC's order as understood in the second alternative limb (second condition of O. 55 r. 7 RC).

[36] According to the defendant's learned counsel, the defence has pleaded the plaintiff's lack of *locus standi* to institute this action without the bank's consent and yet, the plaintiff's reply maintained that the plaintiff had *locus standi* to file this action. As such, the defendant's learned counsel has contended that the plaintiff is barred by the plaintiff's reply from filing encl. 9. I am not able to accept this submission because the sole question in encl. 9 is whether the plaintiff has satisfied cumulatively the two conditions (O. 55 r. 7 RC). The question of whether the plaintiff is barred by the plaintiff's reply is not relevant in encl. 9.

[37] The defendant's learned counsel has sought to persuade me to dismiss encl. 9 on the ground of the plaintiff's delay in obtaining the bank's consent (this action). I am not able to accede to this contention because O. 55 r. 7 RC does not stipulate any time period for the filing of an application to adduce fresh evidence for the purpose of hearing an appeal to the High Court against a lower court's decision.

[38] Lastly, the defendant's learned counsel has invited me to find that encl. 9 constitutes an abuse of court process. As explained in the above para. 35, I allow encl. 9. Hence, encl. 9 cannot amount to an abuse of court process.

[39] The court has a discretion pursuant to O. 59 r. 21 RC to award costs for an interlocutory application. Despite allowing encl. 9, I exercise my discretion to award costs of encl. 9 to be paid by the plaintiff to the defendant. This is due to the fact that the plaintiff could have easily obtained the bank's consent (this action) before the hearing of encl. 7 in SC (when the defence has challenged the plaintiff's *locus standi* to institute this action).

Could Plaintiff File This Action Without Bank's Consent?

[40] I will first decide whether this action could be filed by the plaintiff without the bank's consent.

[41] Section 4(3) CLA states as follows:

> *Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.*
>
> (emphasis added)

[42] There is a line of appellate cases which had decided that assignments of borrowers' equitable and beneficial titles, rights, interest and benefit in parcels (before the issuance of strata titles for those parcels under STA) to financial institutions as security for the financing of the purchases of those parcels, constituted absolute assignments under s. 4(3) CLA whereby the financial institutions are the equitable and beneficial owners of the parcels in question (first approach). The first approach is laid down by the following appellate cases:

(i) in the Federal Court case of *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56 ; [1985] CLJ (Rep) 231; [1984] 2 MLJ 268, at pp. 233 to 235 (CLJ); pp. 269 to 271 (MLJ), Seah FJ (as he then was) has decided as follows:

> *It is common ground that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of s. 4(3) [CLA], then the appellant, as assignor was not entitled to sue in its own name but the action should be brought by the assignee (Public Bank) in its own name or by the assignee in the name of the assignor [Read v. Brown* (1889) 22 QBD 128; *Hughes v. Pump House Hotel Co Ltd* [1902] 2 KB 190 and *Walter & Sullivan Ltd v. J Murphy & Sons Ltd* [1955] 2 WLR 919].
>
> ...
>
> *It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee [Mathew L.J. in Hughes v. Pump House Hotel Co. Ltd. (supra)]. Having stated the preliminary and before we examine the terms of the document of assignment dated February 18, 1978 we would dispose of a short submission*

of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) [CLA] is to be gathered only from the four corners of the instrument itself.

...

Looking at the whole document of February 18, 1978 and bearing in mind the provision of s. 6 [CLA], in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of s. 4(3) [CLA]. The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in cl. 1 thereof [see Fry L.J. in Comfort v. Betts (*supra*) at page 740]. *If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment [Hughes v. Pump House Hotel Co. (supra) and Comfort v. Betts (supra)].*

(emphasis added)

It is to be noted that when the Federal Court decided *Nouvau Mont Dor*, our highest court then was the Privy Council (before the inauguration of our Supreme Court); and

(i) *Nouvau Mont Dor* has been applied in the following judgments of our apex court:

(a) the decision of Gunn Chit Tuan SCJ (as he then was) in the Supreme Court in *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41; [1989] 2 MLJ 149, at pp. 150 to 151; and

(b) the judgment of Abdul Malek Ahmad FCJ (as he then was) in the Federal Court case of *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513, at pp. 519 to 520.

[43] A second approach (second approach) has been explained by Gopal Sri Ram FCJ in the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, at paras. [42] and [43], as follows:

A [42] *Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the*
B *background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. …*

…

[43] *In Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1984] 2 MLJ 268, *Seah FCJ expressed the view that:*
C

> *… whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) [CLA] is to be gathered only from the four corners of the instrument itself.*

This view is not consistent with the speech of Lord Wilberforce in the earlier case of
D *Prenn v. Simmonds* [1971] 3 All ER 237 *at p. 241 (applied by the former Federal Court in Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243) *and later learning to be found in the decisions of the House of Lords in Investors Compensation Scheme Ltd v. West Bromwich Building Society Investors Compensation Scheme Ltd v Hopkins & Sons (a firm) & Ors, Alford v. West Bromwich Building Society & Ors, Armitage v. West Bromwich Building Society &*
E *Ors and Bank of Credit and Commerce International SA (in liquidation) v. Ali & Ors …*

…

It follows from these authorities that the view of Seah FCJ in Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd quoted above is not good law and
F *should not be followed.*

(emphasis added)

[44] I adopt the second approach because when there are conflicting decisions of the Federal Court, the subsequent Federal Court decision should
G prevail over the earlier Federal Court decision: please refer to the Federal Court's judgment delivered by Peh Swee Chin FCJ in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1, at p. 14.

[45] An application of the second approach clearly shows the manifest intention of the bank and plaintiff [manifest intention (bank and plaintiff)]
H that the two LACA's are assignments by way of charge (not absolute assignments). My reasons are as follows:

(i) the manifest intention (bank and plaintiff) is evidenced in the following provisions in the LACA's:

I (a) the court may refer to the recital to an agreement in the interpretation of the agreement – please refer to a judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Luggage*

Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520; [1995] 1 MLJ 719, at p. 732. Paragraph 5, recital (LACA's) has clearly stated that the plaintiff's repayment of the bank loans are "secured" by the LACA's;

(b) no absolute assignment of property would provide as follows:

(1) the assignor's liability to pay on demand the loan granted by the assignee to the assignor [as stated in cl. 1 (LACA's)];

(2) the "security" created by the assignment is "expressly intended to be and shall be a continuing security for all monies whatsoever now or hereafter from time to time" owing to the assignee by the assignor – please refer to cl. 9 (LACA's);

(3) the assignor may be required by the assignee to provide further security for the loan due from the assignor to the assignee [as provided in cl. 11 (LACA's)];

(4) all service charges and maintenance fees payable with regard to the property shall be paid by the assignor (not the assignee) – please see cl. 12.11 (LACA's);

(5) the assignor is required to insure the property with the assignee's interest endorsed on the insurance policy as a "chargee" and to deposit the insurance policy with the assignee [as stated in cl. 17.1 (LACA's)];

(6) the strata title for the property shall be issued in the name of the assignor and the assignor shall execute and deliver a charge of the property to the assignee to secure the assignor's full payment of the loan due to the assignee – please refer to cl. 25 (LACA's); and

(7) according to cl. 27 (LACA's), upon full payment of the loan due from the assignor to the assignee, the assignor "shall be entitled … to obtain a discharge and release" of the property from the assignee; and

(c) clause 8 (LACA's) has provided that as consideration for the bank loans, the plaintiff "absolutely assigns" to the bank the "full and entire" of the plaintiff's "benefits, rights, title and interest" in the two SPA's to the bank . When cl. 8 (LACA's) is read together with the provisions in the LACA's as stated in the above sub-paras. (i)(a) and (b), cl. 8 (LACA's) cannot displace the manifest intention (bank and plaintiff) that the two LACA's are assignments by way of charge; and

A (ii) the factual matrix forming the background to the two LACA's is the two SPA's and bank loans (factual matrix). The factual matrix supports the manifest intention (bank and plaintiff) that the two LACA's are assignments by way of charge (not absolute assignments).

B **[46]** Even if I have applied the first approach, I am still of the view that the manifest intention (bank and plaintiff) is the two LACA's are assignments by way of charge (not absolute assignments). This is because a construction of all the provisions in the LACA's within their "four corners", in particular the provisions stated in the above sub-para. 45(i), clearly support this decision.

C **[47]** In view of the above paras. 44 to 46, notwithstanding the two LACA's, the plaintiff is not required to have the bank's consent to this action as the plaintiff is still the equitable and beneficial owner of the two parcels.

Whether Plaintiff Was Required To Have Bank's Consent (This Action) D When This Action Was Filed

[48] The defendant's learned counsel has submitted that the plaintiff is required to have the bank's consent (this action) at the time of the institution of this action. The bank's consent (this action) was only obtained by the plaintiff after SC's order.

E **[49]** I have no hesitation to dismiss the above contention for the following reasons:

(i) as explained in the above part, the two LACA's are assignments by way of charge (not absolute assignments). Consequently, the plaintiff is not F required at all to have the bank's consent to this action; and

(ii) even if it is assumed that the two LACA's are absolute assignments:

(a) there is nothing in CLA, RC and case law which requires an assignor to have the assignee's consent before the assignor can file a suit regarding the subject matter of the assignment [subject matter G (assignment)];

(b) an assignor may file an action in respect of the subject matter (assignment) without the assignee's consent and may subsequently obtain the assignee's consent to the action (as in this appeal). Alternatively, the assignor may apply to court to join the assignee H in the suit as:

(1) a co-plaintiff under O. 15 r. 6(2)(b)(i) and/or (ii) read with (4) RC (with the assignee's written consent to be joined as a co-plaintiff); or

I (2) a co-defendant pursuant to O. 15 r. 6(2)(b)(i) and/or (ii) RC.

I reproduce below O. 15 r. 6(2)(b)(i), (ii) and (4) RC:

> r 6(2) *Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:*
>
> ...
>
> (b) *order any of the following persons to be added as a party, namely:*
>
> (i) *any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*
>
> (ii) *any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.*
>
> …
>
> (4) *A person shall not be added as a plaintiff without his consent signified in writing* or in such other manner as may be authorized.
>
> (emphasis added);

(c) Order 15 r. 6(1) RC provides that a "cause or matter shall not be defeated by reason of the … non-joinder of any party" – please refer to the judgment of Abdul Rahman Sebli JCA (as he then was) in the Court of Appeal case of *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510, at [102]. If this action "shall not be defeated" solely by reason of the non-joinder of the bank to this action [by virtue of O. 15 r. 6(1) RC], this action should not also be struck out merely because the plaintiff did not have the bank's consent when this action was filed; and

(d) according to O. 1A and O. 2 r. 1(2) RC, the provisions in O. 15 r. 6(1), (2)(b)(i), (ii) and (4) RC should be applied by the court with regard to the "overriding interest of justice and not only to the technical non-compliance" of RC. O 1A and O. 2 r. 1(2) RC state as follows:

> **Regard shall be to justice**
>
> O. 1A *In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.*

A O. 2 r. 1(2) *These Rules are a procedural code and subject to the overriding objective of enabling the court to deal with cases justly. The parties are required to assist the court to achieve this overriding objective.*

(emphasis added)

B If I have acceded to the above submission by the defendant, this is unjust and produce legalism which undermines public confidence in the administration of RC in civil cases.

Had Plaintiff's Reply Pleaded Lack Of Consideration (Alleged Settlement Agreements)?

C **[50]** According to the defendant's learned counsel, the plaintiff's reply did not plead lack of consideration (alleged settlement agreements). Hence, the defendant's learned counsel contends that the plaintiff cannot rely on lack of consideration (alleged settlement agreements) to support this appeal.

D **[51]** Order 18 r. 19(1) provides as follows:

The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

(a) *it discloses no reasonable cause of action* or defence, as the case may be;

E (b) *it is scandalous, frivolous or vexatious*;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) *it is otherwise an abuse of the process of the court*,

and may order the action to be stayed or dismissed or judgment to be entered F *accordingly, as the case may be.*

(emphasis added)

[52] Firstly, in an application to strike out an action under O. 18 r. 19(1) RC, in the interest of justice, the court may dismiss the striking out application and allow a plaintiff to amend the SOC so as to "save" the action G – please see the judgment of Mahadev Shankar JCA in the Court of Appeal in *Muniandy Subrayan & Ors. v. Chairman And Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417; [1997] 1 MLJ 557, at pp. 560 and 561. In a striking out application in *Osman Ismail & Ors v. Kamaralzaman Idris & Ors* [2020] 1 LNS 1296; [2020] 7 AMR 541, at [28] to [30], I have exercised my H discretion pursuant to O. 18 r. 19(1) RC in the interest of justice to:

(i) dismiss the striking out application; and

(ii) grant leave to the plaintiffs to amend their SOC in that suit.

The decision in *Osman Ismail* has been affirmed on appeal to the Court of I Appeal.

[53] In view of the court's discretionary power under O. 18 r. 19(1) RC to allow the plaintiff to amend SOC and plaintiff's reply, I cannot accept the defendant's reliance on the plaintiff's reply to oppose this appeal.

[54] Secondly, in the event that the defendant can rely on the inadequacy of the plaintiff's reply, I reproduce below O. 18 rr. 7(1) and 8(1) RC:

> **Facts, not evidence, to be pleaded**
>
> O. 18 r. 7(1) *Subject to the provisions of this rule and rules 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim …*
>
> ...
>
> **Matters which shall be specifically pleaded**
>
> O. 18 r. 8(1) *A party shall in any pleading subsequent to a statement of claim plead specifically any matter*, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
>
> (a) *which he alleges makes any* claim or *defence of the opposite party not maintainable;*
>
> (b) *which, if not specifically pleaded, might take the opposite party by surprise; or*
>
> (c) *which raises issues of fact not arising out of the preceding pleading.*
>
> (emphasis added)

[55] Paragraph 6.8 of the plaintiff's reply [para. 6.8 (plaintiff's reply)] has pleaded as follows:

> *Further and/or in the alternative, the defendant has to date (approximately 41 months) failed to make a single instalment payment towards the [defendant's instalment payments] due and payable to the plaintiff, despite repeated demands and reminders by the plaintiff in relation to the same* (see paragraphs 35 to 37 of the SOC).
>
> (emphasis added)

I cannot accept the submission of the defendant's learned counsel that the plaintiff's reply has not pleaded lack of consideration (alleged settlement agreements). This decision is premised on the following reasons:

(i) paragraph 6.8 (plaintiff's reply) has pleaded sufficient "material facts" regarding lack of consideration (alleged settlement agreements) as required by O. 18 r. 7(1) RC;

(ii) paragraph 6.8 (plaintiff's reply) is a specific pleading within the meaning of O. 18 r. 8(1)(a) RC which makes the defendant's defence of alleged settlement agreements "not maintainable";

(iii) in view of para. 6.8 (plaintiff's reply), the defendant cannot claim to be taken by surprise as understood in O. 18 r. 8(1)(b) RC by the plaintiff's reliance on lack of consideration (alleged settlement agreements);

(iv) paragraph 6.8 (plaintiff's reply) has complied with O. 18 r. 8(1)(c) RC by raising an issue of fact with respect to lack of consideration (alleged settlement agreements) which has not been pleaded in the SOC; and

(v) as mandated by O. 1A and O. 2 r. 1(2) RC, the court shall apply O. 18 rr. 7(1) and 8(1) RC with regard to the overriding interest of justice.

Did Plaintiff Raise Triable Issues Regarding Enforceability Of Alleged Settlement Agreements?

[56] If there is at least one triable issue raised in an action, the action cannot be struck out – please see the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305, at p. 331.

[57] I accept the submission by the plaintiff's learned counsel that the plaintiff has raised the following three triable issues in this action (three triable issues):

(i) were the alleged settlement agreements void due to lack of consideration (alleged settlement agreements)?;

(ii) whether there was alleged defendant's misrepresentation which would render the alleged settlement agreements voidable at the plaintiff's option; and

(iii) if the alleged settlement agreements were enforceable, did the defendant breach the alleged settlement agreements by not making defendant's instalment payments?

[58] In paras. 15 to 24 of the learned SCJ's "grounds of judgment", the learned SCJ relied on the enforceability of the alleged settlement agreements. With respect, the learned SCJ had failed to consider the three triable issues in encl. 7. As decided in *Lai Yoke Ngan*, the three triable issues warrant a dismissal of encl. 7. On this ground alone, this appeal should be allowed in the interest of justice.

[59] With the three triable issues:

(i) it is not a plain and obvious case for SC to strike out this action – please refer to the Supreme Court's judgment delivered by Mohd Dzaiddin SCJ in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at p. 43;

(ii) this action is neither frivolous nor vexatious within the meaning of para. (b); and

(iii) this action does not constitute an abuse of court process as understood in para. (d) and O. 92 r. 4 RC.

[60] It is to be borne in mind that even if a pleaded claim is weak and is not likely to succeed, this is not a ground in itself to strike out the claim – *Bandar Builder Sdn Bhd*, at p. 44.

Whether Plaintiff Could File This Action For Prayer (Declarations) Without *Locus Standi* And Cause Of Action

[61] Section 41 SRA and O. 15 r. 16 RC provide as follows:

s. 41 SRA **Discretion of court as to declaration of status or right**

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

O. 15 r 16 RC **Declaratory judgment**

No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

(emphasis added)

[62] It is decided in *Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors* [2015] 1 LNS 755, at [33(d)], as follows:

[33] *With respect to the learned counsel for the first to 4th and 6th defendants, I exercise my discretion not to strike out the OS on the ground that the first to 3rd plaintiffs are not registered members of the 6th defendant. This decision is due to the following reasons*:

…

(d) *the High Court has very wide discretionary powers to grant declarations under s. 41 [SRA] and Order 15 rule 16 RC, despite the fact that a plaintiff has no:*

(i) *locus standi to sue; and*

(ii) *cause of action.*

I rely on the following cases:

(1) *in Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361, at 375, Arifin Zakaria FCJ (as His Lordship then was) decided as follows in the Federal Court:*

We are of the view that all the circumstances of the case ought to be considered by the court in arriving at a just result. Secondly, following Re Atkinson and Omar Ali bin Mohd, we think the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment.

(2) *the Court of Appeal's judgment in Dato' Raja Ideris bin Raja Ahmad & Ors v. Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the Chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors* [2012] 5 MLJ 490, at 498 and 499-500, *delivered by Low Hop Bing JCA as follows*:

[25] The question raised in the aforesaid submissions may be formulated as follows:

Upon a true construction of s. 41 [SRA] and O. 15 r. 16, where the OS prays for a declaratory judgment in the form of declarations, is it proper to strike out the OS on the ground that it discloses no reasonable cause of action?

…

[28] *A declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way: see Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554. *'A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law': Brett Andrew Macnamara v. Kam Lee Kuan* [2008] 2 MLJ 450 at p 459 *per Balia Yusof J (now JCA). By virtue of s. 41 and O. 15 r. 16, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has power to grant a declaration irrespective of whether an application has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application:* see eg *Tan Beng Sooi v. Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421; *BSN Commercial bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing* [1997] 5 MLJ 288; and *Cekal Berjasa Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 MLJ 284 at p 294, *per Abdul Malik Ishak J (now JCA).*

[29] *The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action: Guaranty Trust Co of New York v. Hannay* [1915] 2 KB 536 (CA) (Eng); *Dewan Singh v. M Thynappa Ltd & Yeo Teck Chiang* [1939] MLJ 278; *Haji Hussin bin Haji Ali & Ors v. Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 (FC); *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64; *and Tengku Mariam binte Tengku Sri Wa Raja & Anor v. Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110. *Our answer to the question set out in para [25] is in the negative.*

Conclusion

[30] *Based on the foregoing grounds, we allow this appeal, set aside the striking out order of the High Court and substitute it with an order that the OS be reinstated and remitted to the High Court and, with the utmost respect, to be heard and disposed of on merits before another judge.*

(3) in *Dr Mahesan & Ors v. Ponnusamy & Ors* [1994] 3 MLJ 312, at 323, 324 and 326, Zakaria Yatim J (as His Lordship then was) held as follows:

> From the three cases cited above, it is clear that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.
>
> The court has the power to grant a declaration irrespective of whether the applicant has a cause of action or not. The court has the discretion to grant a declaration even if the cause of action does not exist at the time of the filing of the application.
>
> (emphasis added)

The above decision in *Charles Koo Ho-Tung* has been affirmed on appeal to the Court of Appeal.

[63] If:

(i) I have erred in deciding that the two LACA's are assignments by way of charge and the two LACA's are therefore absolute assignments; and

(ii) the plaintiff has no *locus standi* and cause of action to institute this action;

- I will still not exercise my discretion to strike out this action pursuant to O. 18 r. 19(1) RC because as explained in *Charles Koo Ho-Tung*, the plaintiff is entitled to file this action for prayer (declarations) under s. 41 SRA and O. 15 r. 16 RC.

[64] In the Federal Court case of *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1, at [28], Ramly Ali FCJ has decided as follows:

> **If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.**
>
> (emphasis added)

[65] The prayer (declarations) raises:

(i) questions of law;

(ii) issues of fact; and

(iii) questions of mixed law and fact;

which require "lengthy and mature consideration". As such, based on *Seruan Gemilang Makmur*, this is another reason why this action should not have been struck out by SC.

Can SC Simultaneously Dismiss And Strike Out This Action?

[66] Both learned counsels for the plaintiff and defendant did not notice that the learned SCJ had simultaneously dismissed and struck out this action under O. 18 r. 19(1) RC – please refer to SC's order.

[67] Before I gave my oral decision of this appeal, I inquired from learned counsels for the plaintiff and defendant on whether the learned SCJ could simultaneously dismiss and strike out this action pursuant to O. 18 r. 19(1) RC. In accordance with the second rule of natural justice, I then gave both parties in this appeal a right to submit on the matter raised by me – please refer to *Tan Kang Hai v. Slimming Sanctuary Sdn Bhd* [2016] 1 LNS 595; [2016] 5 MLRH 651, at [11(2)]. I am not able to find a previous case from Malaysia, UK and Singapore on this question.

[68] Learned counsels for the plaintiff and defendant stated that SC could not simultaneously dismiss and strike out this action under O. 18 r. 19(1) RC. I agree. The court has the following five discretionary powers pursuant to O. 18 r. 19(1) RC:

(i) the court may strike out a pleading, endorsement on a pleading, an action or counterclaim;

(ii) the court may allow a party to amend a pleading, endorsement on a pleading, action or counterclaim;

(iii) the court may stay an action or counterclaim;

(iv) the court may dismiss an action or counterclaim; or

(v) the court may enter a judgment in an action or counterclaim.

I am of the view that the court cannot simultaneously dismiss and strike out an action or counterclaim under O. 18 r 19(1) RC. Hence, the learned SCJ has committed an error of law by simultaneously dismissing and striking out this action (error of law). The error of law has caused an injustice to the plaintiff which warrants appellate intervention.

Outcome Of This Appeal

[69] Premised on the above reasons:

(i) this appeal is allowed;

(ii) the entire SC's order is set aside;

(iii) this action shall be tried before a learned SCJ (other than Puan Azian binti Othman); and

(iv) costs of this appeal and encl. 7 shall be paid by the defendant to the plaintiff.